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No. 711.

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Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,

Petitioner,

vs.

MANHATTAN RAILWAY COMPANY, *et al.*

LILLIAN BOEHM,

Petitioner,

vs.

MANHATTAN RAILWAY COMPANY, *et al.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MEMORANDUM IN REPLY TO TWO PAMPHLETS ENTITLED "LIST OF 84 OPINIONS", ETC., AND "COPIES OF COMMUNICATIONS FROM THE SENIOR CIRCUIT JUDGES", SUBMITTED BY COUNSEL FOR RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY.

CHARLES FRANKLIN,
ALFRED C. B. McNEVIN,
HERBERT GOLDMARK,
LEONARD H. GOLDENSON,
Counsel for Petitioner Benjamin F. Johnson.

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Not one of the 84 opinions cited in the memorandum of counsel for the Receivers of the Interborough Company can be said to cover nor approach the situation created by Judge Manton's designation of himself in the instant case; and this is also true of the communications sent by Senior Circuit Judges from other circuits. *Nor does it appear that*

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* Filed by leave of Honorable Willis Van Deventer, Associate Justice of the Supreme Court of the United States. Granted May 1, 1933.

the practice was ever opposed. The questions presented go beyond the practice of self-designation, or the borders of the southern district of New York. In the case before the Court the designation has caused discord, where there should be concord and that mutual understanding which engenders and promotes the better administration of justice in our federal courts.

I.

On examination of the eighty-four opinions written by Senior Circuit Judges, while sitting in the district court, it will be found that no statement appears in said opinions giving the circumstances under which said Senior Circuit Judges designated themselves to sit in the district courts wherein they rendered the opinions. It will be observed that twenty-one of the eighty-four opinions were written by Senior Circuit Judge Lacombe of the Second Circuit in the case of *Pennsylvania Steel Co.* v. *New York City Railway Company*, 221 Fed. 440, cited in our brief at page 26.

Judge Lacombe said in that case that, if an objection had been made promptly as to the propriety of his order designating himself to hear that particular case, he would have presented a statement of the situation to the Chief Justice of the United States or a Circuit Judge. Besides, in that case, Judge Lacombe says he entertained jurisdiction over the cause while he was Circuit Judge before the circuit courts were abolished; and hence he found it to be in the public interest, to continue with the cause after he became a member of the Circuit Court of Appeals. It was for that purpose only that he designated himself as district judge to complete the judicial work he had begun. Judge Lacombe points out that congestion of the district court, or an unfinished case partially heard by a Circuit Judge prior to abolition of the Circuit Courts, might justify such designation.

As to the balance of the sixty-three reported cases, listed in said pamphlet, it does not appear what reasons existed for the designation of themselves by the Senior Circuit Judge who wrote the opinions. It is difficult to see, in the absence of a statement of the reasons which prompted the designation, how counsel can reach the conclusion that a Senior Circuit Judge may designate himself a district judge, for reasons other than those mentioned in Sections 13 to 17, inclusive, of the Judicial Code.

II.

An examination of the other pamphlet, which contains communications from Senior Circuit Judges designated to hold district courts, will show that where such communications give any reason by the Senior Circuit Judges for designating themselves, respectively, to sit in the district courts, such reason is one of those set forth in Sections 13 to 17, inclusive, of the Judicial Code, permitting such designation.

In the other communications no reason is given by the Senior Circuit Judges for the designation, and we have the right to assume, therefore, that in such cases the same conditions precedent referred to in said sections existed.

The telegram of Senior Circuit Judge Bingham of the First Circuit does not say under what circumstances he made such appointment, that is, whether it was on account of death, absence, or disability of the district judges to act, or because of an exceptional accumulation of the business of the Court, which the duly appointed district judge was not able to handle expeditiously.

On the other hand, Senior Circuit Judge Buffington of the Third Circuit states that, "in cases where there has been no district judge to act and the public interest required, I have, on occasion, designated myself to sit in a

district court." In other words, Judge Buffington appointed himself to sit in the district court only where there was no district judge who was in position to act, and the public interest made such designation necessary.

In this case, no such situation existed, inasmuch as District Judge Patterson was sitting in the Motion Part of the Court to which he had been assigned in accordance with effective court rules, and was ready to hear the application for the appointment of receivers herein, had such application been made to him. None of the reasons assigned in any of the messages were present in the case at bar.

The letter of Senior Circuit Judge Parker of the Fourth Circuit shows that he designated himself only once to sit as a district judge, and that was when the regularly appointed district judge was in the midst of an important trial at Asheville, N. C., when his Shelby Term was scheduled to open. Judge Parker therefore designated himself district judge for the Western District of North Carolina and proceeded to Shelby and opened the court. Here no emergency required Senior Circuit Judge Manton to designate himself district judge to appoint receivers in the *Brake Shoe* case.

All the other designations in the Fourth Circuit were made by Senior Circuit Judge Waddill of himself, but the list thereof set forth at pages 7 and 8 of the pamphlet do not show the reason for the designations. It may have been that the regular district judge was ill, under a disability or unable on account of other business to hear the cases for which Judge Waddill designated himself.

The telegram of Judge Moorman at page 9 of the pamphlet states specifically that the two designations therein referred to were made only because the judge of the district court was disqualified.

While Judge Altschuler states in his telegram that it has been the custom of the Senior Circuit Judge to

assign himself to the district court, we are justified in the absence of an allegation to the contrary, in assuming that such designations were made for one of the reasons set forth in Sections 13 to 17, inclusive, of the Judicial Code, and not for an arbitrary reason, as in the case at bar.

Judge Kimbrough Stone of the Eighth Circuit merely says that it was the custom of Judge Sanborn, and his own, to assign themselves respectively to the district court, "whenever necessary", but he does not specify what such necessity was.

Judge Wilbur wired, that it was not the practice of his predecessor Judge Gilbert to assign himself to the district court, and that he himself had done it only once "where the district judge was absent, and an extension of time was necessary to preserve the rights of the parties".

In the Tenth Circuit, Senior Circuit Judge Lewis assigned himself only once to the district court, but his telegram does not say under what circumstances the designation was made.

We respectfully submit that, in none of the opinions cited, was the designation fraught with the danger of disrupting the business of the district courts, by improperly fusing the functions and respective spheres of activity of the appellate and district courts which it was contemplated on abolition of the circuits courts would be kept separate and distinct.

Dated, May 3rd, 1933.

CHARLES FRANKLIN,
ALFRED C. B. McNEVIN,
HERBERT GOLDMARK,
LEONARD H. GOLDENSON,
Counsel for Petitioner Benjamin F. Johnson.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 711 and No. 721.

BENJAMIN F. JOHNSON,
Petitioner,
against
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

MEMORANDUM OF PETITIONER, LILLIAN BOEHM, IN REPLY TO

(A) COPIES OF COMMUNICATIONS FROM THE SENIOR CIRCUIT JUDGES IN ANSWER TO INQUIRY OF JUDGE MANTON,

(B) LIST OF 84 REPORTED OPINIONS WRITTEN IN CASES HEARD BY SENIOR CIRCUIT JUDGES HOLDING A DISTRICT COURT,

SUBMITTED BY COUNSEL FOR RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY.

These "Copies of Communications" and "List of 84 Opinions" submitted by counsel for the Interborough Re-

ceivers in a belated effort to support Judge Manton's self-designation to hold a District Court, and his consequent assumption of jurisdiction of the Brake Shoe cause, utterly fail in their purpose.

Analysis of these telegrams and lists establishes, on the contrary, that where Senior Circuit Judges have, in the past, designated themselves to hold a District Court, these designations have been prompted by, and confined to instances of, necessity for assignment because of absence, disability, or disqualification of the regularly sitting District Judge, or the necessity of disposing of an accumulation of business. No instance is shown of a self-designation by a Senior Circuit Judge prompted by the importance of any particular district court business which he deemed to be beyond the ability, experience or judgment of the regularly sitting District Judge, and to necessitate his personal judicial attention. Where self-designations are shown, it does not appear that they met with opposition, or that any rules of the district court existed, similar to those now under review.

I.

Judge Bingham's telegram in answer to Judge Manton's inquiry apparently discloses a practice of self-designation in the First Circuit (Copies of Communications, p. 4). It throws no light however on the circumstances under which such designations are made. Whether Judge Manton's inquiry included the circumstances prompting such designations, we cannot say, for counsel, while publishing the answers to the inquiry, have not seen fit to publish the inquiry itself, obtainable no doubt from the same source. To clarify this answer, we addressed the following telegram to Judge Bingham:

"MAY 2, 1933.

HON. GEORGE H. BINGHAM,
SENIOR UNITED STATES CIRCUIT JUDGE
MANCHESTER, N. H.

AM COUNSEL FOR APPELLANTS IN INTERBOROUGH RAPID TRANSIT RECEIVERSHIP CASE IN UNITED STATES SUPREME COURT. YOUR TELEGRAM OCTOBER 15, 1932 TO JUDGE MANTON HAS BEEN SUBMITTED TO SUPREME COURT. WE HAVE BEEN GIVEN UNTIL FRIDAY TO PRESENT ANY MATTER IN REPLY. WILL YOU KINDLY WIRE ME COLLECT WHETHER YOU HAVE EVER DESIGNATED YOURSELF TO HOLD DISTRICT COURT:

(1) IN VIOLATION OF RULES OF DISTRICT COURT;

(2) OTHER THAN TO TAKE THE PLACE OF ABSENT OR DISQUALIFIED JUDGE OR TO DISPOSE OF ACCUMULATED BUSINESS.

YOUR ANSWER WILL BE SUBMITTED TO SUPREME COURT.

LOUIS BOEHM
30 BROAD STREET
NEW YORK CITY."

and received this reply:

"BU285 78 DL COLLECT-MANCHESTER NHAMP
2 139P

1933 MAY 2 PM 1 57

LOUIS BOHEN—
30 BROAD ST. NYK—

TELEGRAM RECEIVED IT HAS BEEN THE CUSTOM IN THIS CIRCUIT FOR THE PAST TWENTY YEARS OR MORE FOR THE SENIOR CIRCUIT JUDGE BEFORE THE OPENING OF A GIVEN TIME OF COURT IN THE MASS DISTRICT TO DESIGNATE ALL THE DISTRICT JUDGES IN THE CIRCUIT OUTSIDE THAT DISTRICT AND ALL THE CIRCUIT JUDGES COMMA INCLUDING HIMSELF COMMA TO SIT

IN THE MASS DISTRICT AT SUCH TERM PERIOD *THIS HAS BEEN DONE TO FACILITATE THE BUSINESS IN THAT DISTRICT*—

GEORGE H. BINGHAM."

(Our Italics)

It thus affirmatively appears that the motivating purpose of the self-designations in the First Circuit has been to dispose of accumulation of business in the busy Massachusetts District.

It appears from Judge Buffington's response to Judge Manton's inquiry that self-designations in the Third Circuit have been limited to instances of absence of the District Judge (p. 4).

Judge Parker, speaking for the Fourth District, had occasion to designate himself but once and this was necessitated by the enforced absence of the District Judge to open a scheduled term of court (p. 6).

The only two instances of self-designation in the Sixth Circuit reported by Judge Moorman arose from disqualification of the regular District Judge (p. 9).

Judge Alschuler's response indicates that it has been the practice in the Seventh Circuit for the Senior Circuit Judge to designate himself and his colleagues for each term of the District Court for Chicago, the busiest district and the largest metropolitan center in the Circuit. Obviously, these designations are made to facilitate the disposition of accumulated business in the busy Chicago District (p. 9).

In answer to our telegraphic inquiry to Judge Alschuler similar to that sent to Judge Bingham, above quoted, we received the following reply:

"CA1022 98 NL COLLECT—GN CHICAGO ILL 3
1933 MAY 3 PM 9 10

LOUIS BOEHM—
30 BROAD ST NYC—

I KNOW OF NO RULES OF DISTRICT COURTS OF THIS CIRCUIT ON THE SUBJECT OF ASSIGNMENT OF JUDGES TO SIT IN THOSE COURTS AM INFORMED THERE ARE NO SUCH RULES THEREON IN THE CHICAGO DISTRICT CAN ONLY SAY AS STATED IN TELEGRAM TO JUDGE MANTON THAT FOR MANY YEARS IT HAS BEEN CUSTOMARY HERE TO DESIGNATE CIRCUIT JUDGES INCLUDING SENIOR JUDGE TO THE CHICAGO DISTRICT COURT AT THE BEGINNING OF EACH TERM THEREOF *FOR THE CONVENIENCE OF THAT COURT AND THE PUBLIC* SO FAR AS I KNOW NO QUESTION ON THAT SUBJECT HAS EVER BEEN RAISED HERE—

SAMUEL ALSCHULER."

(Italics ours.)

While it appears from Judge Kimbrough Stone's answer to Judge Manton's telegram (p. 10) that self-designations had been made in the Eighth Circuit, it was silent as to the circumstances prompting the designations. Our telegram to Judge Stone, similar to that above quoted, brought the following reply, indicating a practice of avoiding self-designation when at all possible:

"CZ430 43 COLLECT— DX STPAUL MINN 2 211P
1933 MAY 2 PM 3 24 .0

LOUIS BOEHM—
30 BROAD ST CD NYK—

YOUR WIRE RECEIVED THERE ARE NO RULES IN ANY DISTRICT COURT IN THIS CIRCUIT WHICH COULD AFFECT ASSIGNMENT OF JUDGE TO A DISTRICT MY OWN WORK IS SO HEAVY THAT I AVOID ALL DIS-

TRICT WORK WHERE POSSIBLE TO SEND SOME OTHER JUDGE—

KIMBROUGH STONE SENIOR US CIRCUIT JUDGE."

Judge Wilbur, in the Ninth Circuit, reported to Judge Manton that self-designation was not the practice of his predecessor and that he himself had made a self-designation in only two instances, one of disqualification; and the other of absence of the district judge (p. 10). In response to our telegraphic inquiry, similar to that above quoted, he replied:

"GXB14 2 COLLECT— CO. SANFRANCISCO CALIF 2 1010A

1933 May 2 PM 1 20

LOUIS BOEHM
30 BROAD ST NYK—

NO—
CURTIS D. WILBUR"

The circumstances supporting the single instance of self-designation reported in the Tenth Circuit do not appear (p. 11).

It remains to note that we sent similar inquiries by telegraph to the Senior Circuit Judges of all the Circuits other than the Second Circuit, but that no response has been received other than herein set forth. Copies of our communications and the original replies are submitted herewith for the information of this Court.

II.

Considering now the list of 84 opinions reported, written by Senior Circuit Judges holding a District Court, which counsel have industriously compiled, it can of itself have no meaning without an accompanying showing of the circumstances under which the designation in

each case was made. It is unfortunate that counsel's industry was not applied to this essential inquiry. For all that appears, the self-designations evidenced by these opinions were all prompted by absence, disability, or disqualification of the regular District Judge or the necessity of disposing of accumulated business, within the Judicial Code, Secs. 13-17, incl.

We have in the very limited time for reply available to us, endeavored to supply this deficiency. Our examination of these 84 opinions, discloses that:

Twenty-one (21) opinions were written by Judge Lacombe in the single case of *Pennsylvania Steel Co., et al.* v. *N. Y. City Ry. Co.,* in which Judge Lacombe designated himself to sit to continue the administration of an equity receivership which he had commenced and was administering as a *nisi prius* judge in the old Circuit Court, when the Judicial Code abolished the court and elevated him to the Circuit Court of Appeals (221 Fed. 440).

Six (6) opinions pertain to cases which were similarly pending in the old Circuit Court before the Senior Circuit Judge, then *nisi prius* judge, was elevated, the designations being made to enable him to complete his unfinished business, viz:

Weed Chain Grip Case, 194 Fed. 448, a patent case, heard by Lacombe, S. C. J., in March 1912. It appears from the opinion that he had had this case before him previously, when the old Circuit Court ceased to function on Dec. 31, 1911.

National El. Sig. Co. case, 194 Fed. 893, a patent case, heard by Lacombe, S. C. J. on March 18, 1912. He had previously heard this case as *nisi prius* Judge in the old Circuit Court on December 5, 1911 and had granted a preliminary injunction (193 Fed. 424).

Brown v. *Sharp Mfg. Co.* case, 195 Fed. 84, a patent case, final hearing before Colt, S. C. J., March

21, 1912. The opinion indicates that the bill was filed in June 1907. It may reasonably be inferred that Judge Coldt had this case before him in the old Circuit Court and after his elevation to the new Circuit Court of Appeals, designated himself to hold a District Court to complete this unfinished business.

Carpenter v. *Knollwood Cemetery* case, (2 opinions) by Colt, S. C. J., 195 Fed. 84, Feb. 16, 1912, and 198 Fed. 297, July 7, 1912. Motions in an injunction suit which Judge Colt had heard as *nisi prius* Judge in the old Circuit Court and in which he had granted an injunction on June 1911 (see 188 Fed. 856).

In re Steiner, 195 Fed. 299, Lacombe, S. C. J., Feb. 1912. Contempt proceedings. The opinion shows that the contempt was committed in the old Circuit Court and the proceedings there begun prior to December 1911 when the court was abolished.

Fifteen (15) opinions, out of a total of 16, cited in the First Circuit, relate to matters heard by the Senior Circuit Judge in the busy Massachusetts District and are readily explained by Judge Bingham's telegraphic reply to our inquiry, above quoted, as prompted by the accumulation of business in that district.

Three (3) opinions by Sanborn, S. C. J., 8th C. (246 Fed. 260, 288 Fed. 612, 28 Fed. (2nd) 174), relate to the North American Co. case, an equity receivership conducted by Judge Sanborn for several years. The basis for the original designation is not evident from the opinions.

Thirty-nine (39), the remainder of the opinions cited, do not disclose by their content, the circumstances of the self-designation. From the telegraphic responses to Judge Manton's inquiry and our own, it is a fair inference that these cases reflected self-

designations caused by the accumulation of business, or the absence, disability or disqualification of the District Judge, and were not dictated by any belief on the Senior Circuit Judge's part that the particular case was of such importance as to require his personal judicial attention, or that he was more competent and able, or the regular district judge not sufficiently competent, able and experienced, to handle the particular judicial matter.

It is worthy of note also that of these remaining 39 opinions, 24 were written by Judge Lacombe, sitting in the busy Southern District of New York in the period from January 1912 (when the old Circuit Court ceased to function), to February 1916, when he resigned. The District Court, Southern District of New York, then had but four district judges to transact the current business of the largest metropolitan center in the country, as well as the unfinished business of the old Circuit Court, and the frequent designations of Judge Lacombe are explainable as prompted by the desire to complete his own unfinished Circuit Court business, as well as to assist in the disposition of accumulated business in the District Court during those years. Since his resignation in February 1916, only three opinions instancing designations are cited.

Respectfully submitted,

LOUIS BOEHM,
Counsel for Petitioner, Lillian Boehm.